IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

IN RE:	)	
	)	
JEFFERSON COUNTY,	)	BANKRUPTCY NO. 11-05736-9
	)	
Debtor.	)	Proceedings Under Chapter 9
	)	
	)	
	)	

CITY OF PRICHARD, ALABAMA'S MOTION FOR LEAVE TO FILE AMICUS CURIE BRIEF AND BRIEF OF AMICUS CURIE CITY OF PRICHARD, ALABAMA IN SUPPORT OF JEFFERSON COUNTY'S ELIGIBILITY TO BE A CHAPTER 9 DEBTOR

Comes now the City of Prichard, by and through counsel, and, as amicus curie, moves the Court for leave to file the following brief in support of the eligibility of Jefferson County to be a debtor under Chapter 9 by the authority of Code of Alabama 1975 Section 11-81-3. Amicus City of Prichard makes this submission in order to assist the Court in addressing the important legal issue relating to public sector bankruptcy eligibility in Alabama under that statute by an entity which has not issued funding or refunding bonds.

INTEREST OF AMICUS CURIE

The City of Prichard, Alabama ("Prichard" or "the City") is the debtor in Bankruptcy Case Number 09-15000, a Chapter 9 proceeding in the Bankruptcy Court for the Southern District of Alabama. In a decision presently on appeal, Judge Shulman dismissed the City's Chapter 9 case on the grounds that it was not eligible for Chapter 9 relief under Section 11-81-3 because it had not

issued funding or refunding bonds, the same issue presently before this Court. On appeal, the United States District Court for the Southern District of Alabama has certified this question to the Supreme Court for the State of Alabama. (S.D. Ala. Case Number 1:10-00622-KD-M).

The Alabama Supreme Court has accepted the following certified question from the District Court, where the City's appeal has been submitted on briefs and is awaiting decision in Supreme Court of Alabama in Case Number 1100950: "Whether Section 11-81-3 requires that an Alabama municipality have refunding or funding bond indebtedness as a condition of eligibility to proceed under Chapter 9 of Title 11 of the United States Code."

As a result of the appeal and the certified question on this issue, extensive effort has been devoted by the City to this question of statutory interpretation since the issue was presented in its case as a matter of first impression, and the City believes it can offer the Court a useful perspective. In addition to its special interest in this issue and its unique experience in the statute and its application to Chapter 9 eligibility, the City avers that its participation may aid the Court in resolving the issue before it and that its participation, which is limited to the submission of this argument, will not cause a delay in these proceedings, and is otherwise appropriate under the standards for participation as an amicus curie in Chapter 9 proceedings set forth in *In Re City of Bridgeport*, 128 B.R. 30, 32 (Bankr. D.Conn. 1991).

SUMMARY OF THE ARGUMENT

At stake before this Court and in the City's certified question is the decision to bar access to the federal judicial bankruptcy process to Jefferson County, Prichard and other similarly situated insolvent Alabama cities, counties, towns and municipal authorities which have not issued bonds prior to seeking bankruptcy relief. Prichard asserts that the Alabama Southern District Bankruptcy Court erroneously interpreted Section 11-81-3 to require the prior issuance of funding or refunding bonds as a condition of eligibility for Chapter 9 bankruptcy relief, and in so doing, imposed significant limitations on municipal debt adjustment that were not intended by the Alabama Legislature and are not actually contained in the language of the statute. These are the same limitations which the creditors in opposition to Jefferson County's eligibility are now asserting in this Court.

The limitations on bankruptcy relief asserted by the creditors and adopted by the City's Bankruptcy Court result from undue emphasis on the phrase "which shall authorize the issuance of refunding or funding bonds," coupled with a failure to construe the statute as a whole, to consider its history, purpose and objectives, to abide by its plain language, and to duly respect the absence of that phrase which they contend must be engrafted twice onto the final sentence of Section 11-81-3. Such a statutory interpretation is in contravention of the accepted Alabama rules of statutory construction and in direct derogation of the Alabama Legislature's stated purpose in enacting the statute, which was to

"[a]uthoriz[e] the governing body of any county, city or town to exercise all powers necessary to carry out plans for refinancing its indebtedness, and to proceed under any Act of Congress of the United States relating to the readjustment of municipal indebtedness...". Acts of Alabama 1935, No. 197.

The national community of bankruptcy experts and scholars which have examined and surveyed Section 11-81-3 in articles and presentations addressing the availability of Chapter 9 relief among the various states have unanimously agreed that it is a specific enabling act for municipal bankruptcy for all Alabama counties, cities, towns, and municipal authorities organized under Article 9, Chapter 47 of Title 11. Experts such as Daniel J. Freyberg have gone even further to describe Section 11-81-3 as a statute "which expressly enable[s] municipalities to file bankruptcy under federal law **without further restriction**."

Historically, the failure to have issued bonds has not been perceived as a limitation on bankruptcy relief by the Bankruptcy Courts of Alabama, and the vast majority of recent Chapter 9 debtors have not held bond indebtedness during their Chapter 9 proceedings. Neither prior Chapter 9 practice nor judicial authority support a construction that "...the State of Alabama hereby gives its assent thereto and hereby authorizes <u>each county, city or town, and municipal authority</u> organized under Article 9, Chapter 47 of this title to proceed under the provisions of the acts for the readjustment of its debts" is a provision of special application, limited only to those municipalities which have issued

refunding or funding bonds prior to seeking bankruptcy relief.

Such an interpretation renders Chapter 9 relief the rare exception, rather than the general rule that the Legislature intended when it passed the Act during the Great Depression. The limitation of bankruptcy relief to political subdivisions which have issued funding or refunding bonds is a limitation which does not, in reality, exist in the language of the statute. Such a construction should be rejected by this Court in order to re-establish municipal bankruptcy as the unconditional privilege afforded to all Alabama cities, counties and towns by the Alabama Legislature when it enacted Section 11-81-3.

ARGUMENT

Section 109(c) of the Bankruptcy Code governs municipal eligibility to be a debtor under Chapter 9. 11 U.S.C. 109(c). In the Bankruptcy Reform Act of 1994, Congress amended the statute to require specific authorization by the states for their municipalities to be enabled to seek Chapter 9 relief to adjust their municipal debts. 11 U.S.C. 109(c)(2); *In Re County of Orange*, 183 B.R. 594, 603-04 (Bankr. C.D.Cal. 1995).

In 2001, the Legislature of the State of Alabama enacted the current municipal bankruptcy enabling statute contained in Code of Alabama 1975 Section 11-81-3, which provides:

> The governing body of any county, city or town, or municipal authority organized under Article 9, Chapter 47 of this title which shall authorize the issuance of refunding or funding bonds may exercise all powers deemed necessary by the governing body for the execution and fulfillment of any plan or agreement for the settlement, adjustment, refunding or funding of the indebtedness of the county, city or town, or municipal authority

> organized under Article 9, Chapter 47 of this title not inconsistent with the provisions of law relating to the issuance of refunding or funding bonds. Without limiting the generality of any of the foregoing powers, it is expressly declared that the governing body shall have the power to take all steps and proceedings contemplated or permitted by any act of the Congress of the United States relating to the readjustment of municipal indebtedness, and the State of Alabama hereby gives its assent thereto and hereby authorizes each county, city or town, or municipal authority organized under Article 9, Chapter 47 of this title in the state to proceed under the provisions of the acts for the readjustment of its debts.[1]

When the Alabama Southern Bankruptcy Court held that the issuance of funding or refunding bonds was a condition precedent to municipal bankruptcy relief in Alabama, it did so without legal support or precedent as a basis for its decision. Its interpretation was based solely on that Court's reading and interpretation of the statutory language of Section 11-81-3, in which it agreed with a group of City employees that the language "which shall authorize the issuance of refunding or funding bonds" meant that, in order to fall within the purview of the statute, each municipal governing body must have issued funding or refunding bonds. For the reasons set forth herein, that construction of the statute is erroneous, and should be rejected in favor of general public sector bankruptcy eligibility in Alabama when this Court interprets Section 11-81-3 anew.

I. Expert Analysis of the Statute.

While it is true that no legal authority supports the Southern

[1] In so doing, they adopted the same wording of the enabling legislation used in Alabama Code (1958) Title 37, Section 253, which had enabled municipal bankruptcies in Alabama since the mid-1930s.

District Bankruptcy Court's decision, and that there is no Alabama caselaw interpreting Section 11-81-3, this does not mean that the statute has not been considered and analyzed by numerous bankruptcy experts in the public and private sectors in published scholarly articles, journals, periodicals and presentations which have examined and surveyed specific legislative authorization by the states for their respective municipalities to file for Chapter 9 debt adjustment.

Separately and severally, each and all of these nationwide bankruptcy experts who have analyzed Section 11-81-3 have determined that there is no limitation in the statute in order to be entitled to relief under Chapter 9 in the state of Alabama, and have concluded that it is a specific enabling act for municipal bankruptcy for all Alabama counties, cities, towns, and municipal authorities organized under Article 9, Chapter 47 of Title 11.[2]

For example, noted bankruptcy authority Stephen H. Case prepared a memorandum to the National Bankruptcy Review Commission in 1997 entitled "Introduction to Chapter 9 and Related Proposals" in which he found §11-81-3 to meet the requirements of Bankruptcy Code §109(c) for specific state authorization to be a debtor under Chapter 9. He did not find the Alabama Code section to be qualified or conditioned in any manner. Exhibit A hereto.

His conclusion was adopted by the National Bankruptcy Review Commission in its review entitled "Chapter 9: Municipal Bankruptcy

[2] Article 9, Chapter 47 of Title 11 defines "municipality" as any city or town incorporated under the laws of the State of Alabama. Code of Alabama 1975 §11-47-210(14).

Relief" in which the National Bankruptcy Review Commission opined that Alabama was one of twelve states, at the time, which had adopted specific state authorization for municipalities to file for Chapter 9 relief. Exh. B.

That conclusion was also adopted by the American Bankruptcy Institute in its presentation "Welcome to the Next Financial Bubble," in the Winter 2008 Leadership Conference, in which the presenters specifically found that all Alabama municipalities were authorized by §11-81-3 to file for Chapter 9 relief and that there were no limitations or other requirements, as the statute "applies to the governing body of any county, city or town, or municipal authority organized under Article 9, Chapter 47 of Title 11." Exh. C. This bolsters the American Bankruptcy Institute's 1997 "Memorandum Re: Introduction to Chapter 9" which came to the same conclusion, that §11-81-3 was a specific enabling statute for Chapter 9 relief by all Alabama municipalities. Exh. D.

Bankruptcy expert Daniel J. Freyberg agreed in his "Comment: Municipal Bankruptcy and Express State Authorization to be a Chapter 9 Debtor: Current State Approaches to Municipal Insolvency - and What Will States Do Now?" published at 23 Ohio Northern University Law Review 1001 (1997):

> Many states have adopted measures which expressly enable municipalities to file bankruptcy under federal law **without further restriction** [citing Ala. Code 11-81-3]. Other states require approval by designed review agencies, commissions, or other authority, or otherwise restrict and oversee a municipality's fiscal distress. A few states even have elaborate internal systems designed to resolve serious debt crises without resort to the federal system. Still others clearly intend that no

> municipal bankruptcies will arise in that state. The largest group of states have no enabling statutes or other provision within their law for dealing with municipal financial distress. (emphasis added).

Exh. E. Had this expert found the Alabama statute to be limited by the requirement of bond indebtedness, Alabama would have been listed among the states with specific restrictions to Chapter 9 eligibility; instead, he concurred with the American Bankruptcy Institute and the National Bankruptcy Review Commission that the Alabama statute expressly enables all Alabama municipalities to file for Chapter 9 relief with no additional qualifications or restrictions.

This conclusion was shared by Jonathan J. Spitz of the Emory University School of Law and the Southwestern Bankruptcy Law Institute, in "Federalism, States and the Power to Regulate Municipal Bankruptcies: Who May Be a Debtor under Section 109(c)?", 9 Bankr. Dev. Journal 621 (Exh. F), listing Alabama as one of fifteen states (at that time) which "have specifically authorized their municipalities and political subdivisions to file for bankruptcy protection." Most recently, in the Wasman, Shroeder article of August 25, 2009, "Municipal Bankruptcy: Real Option or Political Tool?" (Exh. G), the authors found Alabama to be among 25 states which specifically authorize municipal bankruptcy; in examining "Qualifications or Restrictions", Section 11-81-3 was found to be unqualified, unrestricted and to apply "to any county, city, town or municipal authority." (Exh. G).

II. Historical Chapter 9 Relief in Alabama.

Alabama municipal bankruptcies principally have been filed by

cities, towns and other municipal authorities which have not issued bonds or held bond debt. A PACER review of recent Alabama Chapter 9 cases discloses:

Entity	Case #	Filing Date	Court	Bond Debt?
Town of	04-73885-CMS9	12/14/2004	Bky N. Dist. Alabama	Warrants Millport only
City of Prichard	99-13465	10/05/1999	Bky S. Dist. Alabama	Lease obligation issued in support of bonds issued by Public Bldg. Authority
Greene County	96-72047	09/11/1996	Bky N. Dist. Alabama	Warrants only
Town of North Cortland	92-82747-JAC9	12/09/1992	Bky N. Dist. Alabama	No
City of Lipscomb	91-03033-ABB9	04/19/1991	Bky N. Dist. Alabama	FHA Public Improvement Bond
Etowah Solid Waste Disposal Authority	02-42175	06/22/2002	Bky N. Dist. Alabama	Unclear - no Plan on PACER, convrtd to Chapter 7
West Jefferson Amusement & Public Park Auth.	02-04303-BGC9	06/04/2002	Bky N. Dist. Alabama	Bonds
West Walker Water Authority	98-71559-CMS9	06/09/1998	Bky N. Dist. Alabama	No
Alabama State Fair Authority[3]	04-03695-BGC9	06/24/1994	Bky N. Dist. Alabama	No

[3] The City requests that the Court take judicial notice of these Chapter 9 proceedings within this State as evidenced and documented by the PACER system, pursuant Federal Rule of Evidence 201.

Thus, historically in Alabama, the requirement for bond debt as a condition to Chapter 9 eligibility has not been perceived by the Bankruptcy Courts of this State, and Chapter 9 bankruptcy in the past has proceeded routinely without the requirement for bond indebtedness.

III. Alabama's Accepted Rules of Statutory Construction.

To construe Section 11-81-3 to require bond debt as a condition of Chapter 9 eligibility requires the replication of the phrase "which shall authorize the issuance of funding or refunding bonds" from the first sentence of the statute into the unconstrained language of the second sentence of the statute - to limit the phrase "governing bodies" in that second sentence to those which have authorized the issuance of bonds. (See, e.g. Doc. 380, Bank of New York Mellon Opposition, at page 13: "Accordingly, the governing body mentioned in the second sentence (emphasis in original) is limited to the "governing body of any county ... which shall authorize the issuance of refunding or funding bonds" mentioned in the first sentence.") Such a replication of that phrase within the statute is erroneous for multiple reasons and upon separate and several grounds of statutory construction under Alabama law.[4]

First, the replication of that limiting phrase onto the

[4] Federal courts use a state's principles of statutory construction and the state's legislative history in construing state statutes. Federal Savings and Loan Ins. Corp. v. Butler, 904 F.2d 505, 510-15 (9th Cir. 1990). See also, Nevada Fair Housing Center, Inc. v. Clark County, 565 F.Supp.2d 1178, 1187 (D.Nev. 2008).

language of the second sentence - where it is not found in the text of the statute - violates an Alabama principle of statutory construction known as the "doctrine of last antecedent":

> By what is known as the doctrine of 'last antecedent' relative and qualifying words, phrases or clauses are to be applied to the words or phrases immediately preceding, and **are not to be construed as extending to or including others more remote...** (emphasis added).

White v. Knight, 424 So.2d 566, 567 (Ala. 1982), citing C.J.S. Statutes §334 (1953). The Court should not embrace the creditors' construction whereby "governing bodies" throughout the statute is modified by the phrase "which shall authorize the issuance of funding or refunding bonds," as the doctrine of last antecedent forbids it under Alabama law.

Further, it is generally presumed that Congress or the Legislature acts intentionally and purposely when it includes particular language in one part of a statute but excludes it in another. *U.S. v. Steiger*, 318 F.3d 1039 (11th Cir. 2003), cert. denied 538 U.S. 1051, 123 S.Ct. 2120, 155 L.Ed.2d 1095 (2003).

> [W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Duncan v. Walker, 533 U.S. 167, 173, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), quoting *Bates v. U.S.*, 522 U.S. 23, 29-30, 118 S.Ct. 285, 139 L. Ed. 2d 215 (1997), in turn quoting *Russello v. U.S.*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed. 17 (1983). *See also*, *Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205 (11th Cir 2009); *Dees v. Coaker*, 51 So.3d 323, 330

(Ala.Civ.App. 2009). The absence of language from one section of a statute where that same language is included elsewhere is presumed intentional. *Pinigis v. Regions Bank*, 997 So.2d 446, 452-53 (Ala. 2007). In other words, where Congress or the Legislature knows how to say something but chooses not to, its silence is controlling. *In Re Haas*, 48 F.3d 1153, 1156, on remand 195 B.R. 933, rev'd other grounds 162 F.3d 1087 (11th Cir. 1998). The Alabama Legislature not only knew the phrase "which shall authorize the issuance of funding or refunding bonds" but chose not to use it in the second sentence; it can also presumed to have known the simpler phrase "only those governing bodies...which have issued funding or refunding bonds" and chose not to use that phrase anywhere at all, as it logically might have done had it intended to restrict the grant of authority to that small group.

Secondly, the first sentence of the statute, which authorizes general municipal debt adjustment, in or out of court (consistent with bond laws if the entity has issued bonds), and the second sentence, in which the specific in-court bankruptcy authorization is contained, operate independently of each other. In *King v. Campbell*, 988 So.2d 969, 982 (Ala. 2007), based on *City of Mobile v. Salter*, 287 Ala. 660, 666-67, 255 So.2d 5, 10 (1971) and *Allen v. Louisiana*, 103 U.S. 80, 26 L.Ed 318 (1880), the Supreme Court acknowledged the important principle that parts of a statute may be "wholly independent of each other." *King* at 982. This is the situation with Section 11-81-3, in which the second sentence's specific authority for Chapter 9 bankruptcy relief operates

independently and separately from the first sentence's authority for general municipal debt adjustment. The plain language of the second sentence's phrase "and the State of Alabama hereby gives its assent thereto and hereby authorizes each county, city or town, or municipal authority organized under Article 9, Chapter 47 of this title in the state to proceed under the provisions of the acts for the readjustment of its debts" is not limited by the requirement for the issuance of bonds or any other type of debt.

Moreover, more than one hundred years of unbroken precedent of the decisions of the Alabama Supreme Court dictates the final section of a statute - here, the one which contains no mention of bonds - is the controlling provision:

> [A]s between conflicting sections of the same act, the last in order of arrangement will control. (Emphasis added).

Hand v. Stapleton, 135 Ala. 156, 167-68, 33 So. 689, 692 (1902), *Accord*, *Rule 6A, Alabama Rules of Judicial Administration Election of Presiding Circuit Judges, Opinion No. 48*, 606 So.2d 138, 139 (Ala. 1992)(The last legislative expression controls, and even though conflicting provisions contain no temporal difference, the last in order of arrangement controls); *Davis v. State*, 16 Ala. App. 397, 78 So.313, 314 (1918) ("Where...sections are found to be in conflict, then the last section or provision in point of arrangement of the act must control"). Thus, to the extent that the general debt adjustment provisions in the first sentence conflict with the more specific bankruptcy authorization provisions of the second sentence, it is the bankruptcy authorization provisions of

the second sentence which must control. This rule of statutory construction also interacts consonantly with Alabama's rule that "an act dealing with a specific subject takes precedence over an act dealing with a general subject." *Rule 6A, Alabama Rules of Judicial Administration Election of Presiding Circuit Judges, Opinion No. 48*, supra at 138-39. *See also*, *Arthur v. Bolen*, 41 So.3d 745, 749 (Ala. 2010) ("It is a familiar rule of statutory construction that 'specific statutory principles control over the more general provisions'", citing *Mason v. Owens*, 514 So.2d 962, 964 (Ala. 1987), overruled on other grounds, *Wilkins v. Johnson*, 595 So.2d 466 (Ala. 1992).

Third, under Alabama law, the fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. *Gholston v. State*, 620 So.2d 719, 721 (Ala. 1993); *Dark's Diary, Inc. v. Alabama Dairy Comm'n*, 367 So.2d 1378, 1380 (Ala. 1979), citing *League of Women Voters v. Renfro*, 292 Ala. 128, 129, 290 So.2d 167, 169 (1974).

> In this ascertainment, we must look to the entire Act instead of isolated phrases or clauses.

Dark's Diary, Inc. v. Alabama Dairy Commission, supra at 1380, citing *Opinion of the Justices*, 264 Ala. 176, 179, 85 So.2d 391, 394 (Ala. 1956). The reason for this rule has been explained by the Alabama Supreme Court:

> The inartificial [sic] manner in which many of our statutes are framed, the inaptness of expressions frequently used, and the want of perspicuity and precision not infrequently met with, often require the court to look less at the letter or words of the statute, than at the context, the subject matter, the consequences and effect, and the reason and spirit of the law, in

endeavoring to arrive at the will of the law giver. *Alabama State Board of Health ex rel. Baxley v. Chambers County*, 335 So.2d 653, 656 (Ala. 1976). When construing a statute, courts must look to the context, spirit and the whole to reach the true intent of the legislature. *Hawley Fuel Corp. v. Burgess Mining & Constr. Corp.*. 291 Ala. 546, 548, 238 So.2d 603, 605 (1973). Courts are not controlled by the literal meaning or language of a statute, but by its spirit and intention. *Bell v. Prichard*, 273 Ala. 289, 292, 139 So.2d 596, 598 (1962).

The Supreme Court has said it will not strictly construe a statute so as to defeat or destroy the intent and purpose of the statute, and that no strained statutory construction is to be given which would have that effect. *Ex Parte Emerald Mountain Expressway Bridge, LLC*, 856 So.2d 834, 839 (Ala. 2003), citing *Flav-O-Rich, Inc. v. Birmingham*, 476 So.2d 46, 48 (Ala. 1985). A literal interpretation is not to be adopted when it would defeat the purpose of a statute, if any other reasonable construction can be given to the words. *Touart v. American Cyanamid Co.*, 250 Ala. 551. 555-56, 35 So.2d 484 (Ala. 1948): "It is too clear that to apply the proviso here in question...would be to place restrictions upon this latter section that were never intended..." *Id.* at 556. This Court should carefully interpret Section 11-81-3 so as not to impose restrictions which are not contained in the language. Instead, courts will give a statute the construction that will effectuate the Legislature's purpose in passing it. *Cole v. Gullatt*, 241 Ala. 669, 4 So.2d 412 (1941).

The Legislature's purpose and intention in passing Section 11-81-3 was set forth in Acts of Alabama 1935, No. 197, page 586, as:

> Authorizing the governing body of any county, city or town to exercise all powers necessary to carry out plans for refinancing its indebtedness, and to proceed under any Act of Congress of the United States relating to the readjustment of municipal indebtedness, and assenting to the Act of Congress approved May 24, 1934, amending the National Bankruptcy Act. (emphasis added).

The final sentence of Act of Alabama 1935, No. 197 reads:

> "And the State of Alabama hereby gives its assent to the Act of Congress approved May 24, 1934, entitled : An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United State' [sic], Approved July 1, 1898, and acts amendatory thereof and supplemental thereto," **and hereby authorizes each county, city or town in the State to proceed under the provisions of said Act for the readjustment of its debts**. (Emphases added).[5]

Id. As this Court can see, there is no limitation or restriction on bankruptcy relief to only those cities, counties and towns which had previously incurred bond indebtedness; there is no mention whatsoever of funding or refunding bonds in connection with the bankruptcy relief being authorized to all of the State's cities, counties and towns. Absolute, unqualified and unconditional bankruptcy relief to each county, city or town in the State was contemplated by the Alabama Legislature at the time of the original

[5] The 2001 enactments contained in Acts of Alabama 2001, Act 2001-959, p. 839, broadened the relief granted to include municipal authorities organized under Article 9, Chapter 47, of Title 11 of the Code of Alabama 1975, and specified "that the governing body of a municipal authority organized under Article 9, Chapter 47, of Title 11 of the Code of Alabama 1975, may exercise the same powers."

statutory enactment in 1935, during the Great Depression.[6] There was no bond debt restriction at that time, nor were there any bond debt restrictions subsequently imposed in its later re-enactments and amendments.

Fourth, this Court should carefully avoid construing the word "shall" within "which shall authorize the issuance of refunding or funding bonds," in a manner which would change that single word so as to elevate a descriptive phrase to a restrictive one. Again, the Alabama Supreme Court has previously confronted such errors in interpretation of Alabama statutes and has spoken to that problem as well, saying:

> While the word "shall," as used in statutes and otherwise, is generally said to be used in the imperative or mandatory sense, there is a very notable exception to this where from the circumstances it is obvious that the legislature intended otherwise and also where the validity of the statute itself is placed in jeopardy. The exception appears to recognize the fact that the man on the street, aside from strict rules of grammar, often uses the words 'shall' and 'may' interchangeably and without regard to fineness of meaning. Thus, to carry out the real legislative intent, and as it has been said, to prevent injustice from being done by making justice a slave to grammar, courts have under similar circumstances as are here involved construed the word 'shall' as permissive and equivalent to 'may'.

Morgan v. State, 280 Ala. 414, 194 So.2d 880, cert. denied 389 U.S. 7, 88 S.Ct. 47, 19 L.Ed.2d 6 (1967)(cites omitted). Because "shall" ordinarily means "has a duty to," "should," "may," "will," or "is entitled to," Black's Law Dictionary 1407 (8th ed. 1999), the City

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[6] During these times closely akin to the dire financial situation of the Great Depression, a construction to effectuate the Legislative purpose and objectives sanctioning bankruptcy relief is even more compelling.

asserts that "shall authorize the issuance of ... bonds" cannot possibly mean, as its Bankruptcy Court held, "has authorized the issuance of bonds." "Which shall authorize" (present or future tense) does not mean "which has authorized" (past tense) and the "authority" to issue bonds is not the equivalent of the issuance of the bonds. To require that the act of issuing bonds must have taken place in the past as a condition for relief in the present is simply a convolution of the phrase. Instead, as the Supreme Court has acknowledged, "may" (is permitted to) affords a more consonant and common sense meaning to the statute.

Under the City's interpretation of the Alabama principles of statutory construction, the "governing body" which "may" (is permitted to) issue funding or refunding bonds is a composite, catch-all phrase used for the identification of a particular body authorized to act under the statute, not a requirement ("shall") for the issuance of the bonds. In a small town, that "governing body ... which shall authorize the issuance of ... bonds" may be a mayor; in a larger city, it may be the city council. The governing body may be a county commission, or a board of authority of a municipal water and sewer project.[7] There is no convenient and well-understood composite term for these groups of governmental entities, hence, the Legislature's use of an awkward phrase to describe them collectively. Irrespective of how the Legislature

[7] See generally, Code of Alabama 1975 §11-40-12 regarding creation of classes of municipalities, and §11-44-1, 11-44A-1, 11-44B-1, 11-44C-1, 11-43A-1, 11-44E-1 regarding election by these classes of various commission, mayor-council and other (e.g. commission/city manager) categories of "governing bodies."

chose to identify the governmental officials it was vesting with authority to adjust debt and to declare bankruptcy under Section 11-81-3, it was simply designating a group of public sector representatives, not creating an independent requirement for that group first to issue bonds in order to be entitled later to benefit from the provisions of the statute.

The alternate interpretation in which bond indebtedness is a requirement for public sector bankruptcy relief would deprive the vast majority of Alabama cities, counties and towns of the benefits that the statute clearly conveys, thereby destroying the intent and purpose of the Legislature, and engendering disparate treatment for similarly situated municipalities based on the presence or absence of a particular type of debt on their balance sheets. Such an interpretation of the statute should be one easily rejected:

> This Court must construe a statute based on its plain language and when it must decide between alternative meanings, it will not only consider the results that flow from assigning one meaning over another, but it will also presume that the Alabama Legislature intended a rational result, one that advances the legislative purpose in adopting the legislation, that is workable and fair, and that is consistent with related statutory provisions.

Smith v. Smith, 964 So.2d 663, 670 (Ala.Civ.App. 2005), citing *Ex Parte Berryhill*, 801 So.2d 7, 10 (Ala. 2001), quoting *John Deere Co. v. Gamble*, 523 So.2d 95, 100 (Ala. 1988). "As we must with any statute, we read the concept of reasonableness into the provisions of the statute at issue..." *Smith v. Smith*, supra. No reasonable construction would deny the benefits of a statute to those presumptively embraced by its plain language. This principle is easily illustrated by the example of one Chapter 9 debtor having $1

billion in warrant debt, but no bond debt, which would be ineligible under the restricted construction, while a sister municipal debtor with the same $1 billion debt issue which had issued bonds is entitled to Chapter 9 relief. Both are similarly situated insolvent public entities with identical amounts of debt; however, only one is entitled to municipal debt relief under Chapter 9. This is not a reasonable construction of the statute.

Moreover, such an interpretation is clearly inconsistent with the Alabama Legislature's stated intent, which was independently set forth in the preamble to Act 1935-197. The preamble (or synopsis) is the clause at the beginning of the statute explaining the reasons for its enactment and the objects to be accomplished, and is generally considered helpful in the interpretation of any ambiguities within the statute to which it is prefixed. Black's Law Dictionary, "preamble" (6th ed. 1990). That preamble provides that Section 11-81-3 is:

> An Act authorizing the governing body of any county, city or town to exercise all powers necessary to carry out plans for refinancing its indebtedness, and to proceed under any Act of Congress of the United States relating to the readjustment of municipal indebtedness, and assenting to the Act of Congress approved May 24, 1934, amending the National Bankruptcy Act.

Acts of Alabama 1935, No. 197, page 586.

The Alabama Supreme Court has said that in case of doubt or inconsistency between the language in an enacting part of a statute and the language in its preamble, the preamble controls because it expresses in the most satisfactory manner the reason and purpose for the act. *Ball v. Jones*, 272 Ala. 305, 315-16, 132 So.2d 120,

129 (Ala. 1961) (citing Singer, Sutherland Statutes and Statutory Construction, v.2, §4801(3), p. 342).

> In case of doubt in respect of an ambiguous legislative context, the preamble of the act must be resorted to, to ascertain the legislative intent. If the legislative intent is clearly expressed in the preamble, and the body of the act is so constructed as to render its meaning and intent uncertain, and if the act admits of two constructions, one in accord with the intent clearly expressed in the preamble, and the other in conflict with it, courts should adopt the construction which harmonizes with the preamble.

USX Corp. v. Bradley, 881 So.2d 421, 425 (Ala.Civ.App, 2003), aff'd *Ex Parte USX Corp.*, 881 So.2d 437, rhg. denied *Ex Parte USX Corp.*, 2003 Ala. LEXIS 438 (Ala. 2003).

Here, the preamble could not be more clear: There is no mention of bonds, refunding bonds or any other type of debt instrument. There is, instead, an express grant of authority to the governing body of any county, city or town of all the powers necessary to carry out plans for refinancing its debt and proceeding under the federal bankruptcy laws. There are no conditions, no restrictions and no qualifications for the relief - any city, county or town (and since 2001, any municipal authority) is empowered under the Act to adjust its debt and/or seek Chapter 9 relief.

Fifth, without question, the Alabama Legislature, since the statute's inception, has always intended Section 11-81-3 to facilitate, rather than restrict, municipalities' ability to reorganize their debt by commencing federal bankruptcy proceedings. A detailed tracing of the bankruptcy authorization demonstrates that, prior to the 1975 recodification of the Alabama Code, the

bankruptcy authorization appeared in a separate sentence in the applicable statute, entirely separate and apart from any mention of bonds (or any other kind of debt instrument). This Court can see - from the statutory text, title, history, purpose and common sense -that the Legislature has never repealed or restricted the original bankruptcy authorization, nor did it radically alter it forty years after its original passage by merely joining the two sentences with a conjunction during the recodification process. Were there any doubt about this, the Court should consider Section 1-1-10, an express Legislative proclamation that the recodification did not repeal statutes "relating to the public debt or authorizing the issuance of bonds or other evidence of indebtedness by the state or any county, municipality, political subdivision or agency thereof". Repeal by recodification is not a viable interpretation; at no time did the Legislature repeal the authorization for bankruptcy by public sector entities. Because the original bankruptcy authorization pertained to "each" Alabama political subdivision, under Section 1-1-10, the recodified authorization applied to the same groups - not just the handful of Alabama municipalities with bond debt.[8]

Indeed, the reason for the 2001 amendment of Section 11-81-3 was to expand debt adjustment and bankruptcy relief, not to

[8] This Court should also reject creditors' arguments based on the statute's location in the Code within a chapter referencing bonds in its title. Section 11-81-3's caption, placement and location in the Alabama Code must be disregarded under the mandate of Alabama Code Section 1-1-14, as they have no place in a statute's substantive interpretation.

restrict it; the amendment extended the benefits of Section 11-81-3 to municipal authorities organized under Article 9, Chapter 47 of Title 11. Act 2001-959. In all other respects, Section 11-81-3 remained the same as its prior codification, except that it broadened debt adjustment relief to include an additional category of governmental entities.

> [I]nsofar as the two acts [the amendment and the original act] are the same, the new act is regarded as a mere continuation of the earlier one, and as speaking as of the time of the adoption of the original enactment, so that only the new provisions are to be considered as having been enacted at the time of the amendment.

Rule 6A, Alabama Rules of Judicial Administration Election of Presiding Circuit Judges, Opinion No. 48, 606 So.2d 138, 140 (Ala. 1992).

Sixth, arguments that the City's and Jefferson County's interpretation of Section 11-81-3 render the first sentence of the statute superfluous and needless if no limitation to the issuance of bond debt is to be inferred from that phrase, simply misstate and diminish the City's actual position on the purpose of the first sentence. Clearly, that sentence has a purpose and a meaning, (1) which is separate, apart and independent of the specific purpose of the second sentence, (2) describes collectively and identifies the appropriate governmental representative(s) empowered to adjust debt and declare bankruptcy, and (3) supplies the general authority to do so, provided such authority is exercised in conformity with state bond laws if funding or refunding bonds have been issued by the governmental entity.

The first sentence's general provision has both purpose and

operation distinct and different from the second sentence's purpose and authority: it allows the exercise of "all powers deemed necessary by the governing body for the execution and fulfillment of any plan or agreement for the settlement, adjustment, refunding or funding of the indebtedness of the county, city or town, or municipal authority organized under Article 9, Chapter 47 of this title not inconsistent with the provisions of law relating to the issuance of refunding or funding bonds."

This is a broad, general power to adjust and settle public sector debt, in or out of court. This first sentence just does not happen to relate to the specific grant of authority by the State to its political subdivisions to seek Chapter 9 relief; thus, neither the City nor the County are ignoring the first sentence by having taken the position that it is the second sentence which contains the grant of authority for Chapter 9 proceedings. Neither has argued that the first sentence has no purpose or is mere surplusage. If either the City or the County were attempting to settle or adjust debt out of court (or in state court, outside the Chapter 9 process), their representatives would be proceeding under the authority vested by the first sentence. Having passed that stage, it is to the second sentence and its specific bankruptcy authorization that the focus now has shifted.

Logically, under the restricted interpretation urged by the creditors and adopted in the Alabama Southern Bankruptcy Court, the requirement for the issuance of bonds would be a condition for the authority to readjust municipal debt under both the first or the

second sentences of the statute, leaving all Alabama municipalities which have not issued bonds wholly without any means to adjust and/or settle their municipal indebtedness under either provision of the statute. There is no evidence that the Legislature intended to limit the powers of municipalities to deal with their debt problems to only those few cities which have issued bonds; it would never have chosen and utilized broad and sweeping terms like "any county, city or town, or municipal authority" if it really meant to limit the powers to only those holding bond debt. The inclusive nature of the statute belies an intent to exclude the vast majority of Alabama cities, towns, counties and municipal authorities from its scope. If the Legislature had meant to include "only those cities, towns, counties and municipal authorities that have issued refunding or funding bonds", it could have employed such language, but did not. The "authority" of a particular governing body to issue bonds is not the equivalent of a requirement that the governing body have acted on that authority in the past in order to qualify to settle and adjust its municipal indebtedness in the present. This Court should decline to ascribe to the statute such an interpretation.

Conclusion

In comity to the Alabama Supreme Court, this Court might find it proper to elect to await that Court's decision on the certified question on this issue. However, assuming the Court chooses to address the issue of Jefferson County's eligibility, a studied application of Alabama's canons of statutory construction should

compel the conclusion that all Alabama cities, counties and towns enjoy the statutory privilege of debt readjustment under Chapter 9 by the authority of the State of Alabama enacted in Section 11-81-3, without further qualification or restriction. When the Legislature chose to designate the public sector representatives in whom it was vesting the authority to pursue various forms of debt adjustment and relief, it employed a clumsy collective: the "governing body ... which shall authorize the issuance of ... bonds", and this attempt to describe diverse groups of governmental representatives in a single phrase by identifying a specific power they each were authorized to exercise resulted in a strained interpretation and the creation of a restriction which was not intended by the Legislature from the text of the original 1935 Act, from its preamble, and not acknowledged by subsequent scholarly study nor prior Chapter 9 practice in Alabama.

In discussing the issue of the authority for bankruptcy relief, the Court should note the sparse reference to the second clause of the second sentence by the creditors. They do not like it and they can not explain it, so they go to great lengths not to discuss it, other than to insist that it is burdened by restrictive language supplanted and replicated over and over again from a wholly independent portion of the statute. The emphasis on the first clause, and its subsequent reiteration throughout the statute, in contravention of the language chosen by the Legislature, should be rejected by this Court as being against Alabama's established rules of statutory construction, as well as

the text, history and purpose of the Act. Since the terms "municipal indebtedness" and "readjustment of its debts" are neither limited nor restricted to bond debt by the plain language of the statute, the strained interpretation advocated by the creditors should fail here, just as it has been rejected in prior Chapter 9 practice, and by every legal commentator who has considered the authority granted by the Alabama statute.

A common sense interpretation of Section 11-81-3, together with application of those principles of statutory construction, independently confirms what the intent, history and text of the statute demonstrate: the Alabama Legislature did not intend to restrict the authority to adjust debt and file bankruptcy to that handful of select cities and counties that have issued bonds.

For the foregoing reasons and upon the above referenced authorities, the City of Prichard respectfully requests that the Court will accept and consider its argument as Amicus Curie, and that upon consideration, will hold that the issuance of funding or refunding bonds is not a condition of eligibility for Chapter 9 relief in Alabama under Section 11-81-3, and that all cities, counties, towns and municipal authorities in Alabama enjoy the power to adjust debt and declare bankruptcy under its terms.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to File Amicus Curie Brief and Brief of Amicus Curie City of Prichard was electronically filed and served in this case on this the 16th day of December, 2011, in accordance with the method established under this Court's CM/ECF filing system and Administrative Procedures upon all parties who have appeared and requested electronic notice in the case.

/s/ Suzanne Paul
Suzanne Paul